IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BODY SUPPORT SYSTEMS, INC. PLAINTIFF

VS. NO. 1:96CV161-D-A

BLUE RIDGE TABLES, INC. DEFENDANT

MEMORANDUM OPINION

This cause comes before the court upon the motion of defendant Blue Ridge Tables, Inc. for partial summary judgment.[1] Among its other claims asserted against the defendant, plaintiff Body Support Systems, Inc. has alleged that the defendant breached its contract not to compete with the plaintiff, breached its fiduciary duty owed to the plaintiff and violated the Uniform Trade Secrets Act. The defendant contends that no genuine issues of material fact exist with respect to these three claims and that case law dictates the court enter a judgment as a matter of law in favor of the defendant as to those claims. The plaintiff responds that genuine issues of material fact do indeed exist and summary judgment is therefore inappropriate. Both sides have briefed the issues and the motion is ripe for determination by this court.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S.

[1]On July 17, 1996, the undersigned issued a memorandum opinion and order enjoining the defendant from selling or otherwise placing in commerce its product entitled "The Embracer." The court declined to issue an injunctive order prohibiting the defendant from disparaging the bodyCushion. Body Support Sys., Inc. v. Blue Ridge Tables, Inc., Civil Action No. 1:96cv161-D-A (N.D. Miss. July 17, 1996) (Davidson, J.) (Order Granting In Part and Denying In Part Plaintiff's Motion for Preliminary Injunction).

317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 695, 110 S. Ct. 3177 (1990).

II. FACTUAL BACKGROUND[2]

> The court has previously set out the facts underl
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> The plaintiff, Body Support Systems, Inc. ("BSS"), is an Oregon corporation that has been in business since 1987. Its principal product is a therapeutic cushion labeled the bodyCushion. While the internal components of the bodyCushion are protected under patents issued to the president of BSS, Tom Owens, on October 8, 1991, the overall product itself is not patented or subject to a registered trademark. Sometime during 1992, Wingard, the president of the defendant, Blue Ridge Tables, Inc. ("Blue Ridge"), discussed the possibility of Blue Ridge undertaking manufacture of the bodyCushion.[3] Mississippi wages being what they are, BSS could not produce the product much cheaper than BSS could in Oregon. Pursuant to these discussions, BSS provided Blue Ridge with trade secrets and product specifications of the 1990 model necessary to enable [Blue Ridge] to produce and offer BSS's product. However, under the protection of a confidentiality agreement executed by Wingard on behalf of Blue Ridge, in any event, the exclusive beneficiary of BSS's efforts became Blue Ridge to manufacture the bodyCushion.
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> In August 1995, BSS learned that a product manufactured by Blue Ridge which appeared identical to the bodyCushion was exhibited at a massage therapist trade show called the Pacific Symposium in San Diego, California. BSS ordered one of these products from Blue Ridge the following day and received it approximately two weeks later. Finally, in the January/February 1996 issue of the trade journal *Massage Today*, Owens noticed an advertisement for the product manufactured by Blue Ridge labeled "The Embrace." In the magazine, the Embrace appears to be a nearly indistinguishable clone of the 1990 version of the bodyCushion which incorporates the trade secrets BSS disclosed to Blue Ridge in May 1996, requesting . . . injunctive rel

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[2]Although the court is aware that facts found by this court following the preliminary injunction hearing are not controlling within the summary judgment context, neither party presented any evidence which contradicts those facts previously found. Furthermore, in a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

[3]The parties dispute which side approached the other concerning this speculative licensing agreement. However, as the court must take the disputed facts in the light most favorable to the non-moving party, the court finds for purposes of this summary judgment motion that Owens approached Wingard.

III. BREACH OF CONTRACT CLAIM[4]

Blue Ridge contends that the restrictive contractual provision allegedly breached by it is unenforceable as a matter of law because it contains no temporal or geographic limitation. BSS submits that factual issues preclude a ruling at this juncture on the contract's reasonableness, or, in the alternative, that the court may modify the limitations under Mississippi law to conform to a reasonable standard. The relevant language in question provides:

> It is further clearly agreed that the undersigned shall not engage in competition or otherwise compete, market, sell or make available on its behalf the bodyCushion, any products of like or similar design to the bodyCushion, or its accessories and other elated [sic] products now existing.

Plaintiff's Exh. 4, Confidentiality Agreement, p.2.

Non-competition covenants are generally disfavored by Mississippi courts, but they will be upheld whenever found to be reasonable. Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975 (Miss. 1992); Thames v. Davis & Goulet Ins., Inc., 420 So. 2d 1041, 1043 (Miss. 1982); Texas Rd. Boring Co. of Louisiana-Mississippi v. Parker, 104 So. 2d 885, 888 (Miss. 1967); Herring Gas Co. v. Mager, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (construing Mississippi law), *aff'd*, 22 F.3d 603 (5th Cir. 1994). When considering such agreements, the court should look to three factors: the employer's rights, the employee's rights and the rights of the public. Herring, 813 F. Supp. at 1245 (citing Thames, 420 So. 2d at 1043); Texas Rd. Boring, 104 So. 2d at 888. In this instance, the situation is somewhat altered as the contracting parties were not in a superior versus subordinate relationship as employer and employee, but instead were businessmen negotiating at arm's length. Blue Ridge, furthermore, has not alleged that BSS exerted any undue influence or exercised any unfair advantage over Blue Ridge during the negotiations of the agreement in question. See Texas Rd. Boring, 194 So. 2d at 888 (also making special note that "the parties to the contract were businessmen bargaining at arm's length with each other in an atmosphere free of any undue influence

[4]This court shall apply Mississippi state law as it is well settled that "[a] federal court exercising pendent jurisdiction over state law claims must apply the substantive law of the state in which it sits." Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 353 (5th Cir. 1989) (citing cases).

or advantage").

"The validity and therefore, the enforceability of a non-competition provision is largely predicated upon the reasonableness and specificity of its terms, primarily, the duration of the restriction and its geographic scope." Empiregas, 599 So. 2d at 975. Generally, if the limitations contained in a restrictive covenant are reasonable, they will be enforced. Texas Rd. Boring, 194 So. 2d at 888-89. The burden remains on the party seeking to enforce the noncompetition clause to demonstrate its reasonableness in light of the facts developed in the case. Id. at 889. If such limitations are determined to be unreasonable, the court may restrict their application to reasonable, and thus enforceable, proportions. Id. at 888-89; Redd Pest Control Co. v. Heatherly, 157 So. 2d 133, 135-36 (Miss. 1963); Hensley v. E.R. Carpenter Co., 633 F.2d 1106, 1110-11 (5th Cir. 1980) (construing Mississippi law and noting reasonableness of contractual restraint on competition is question of law); Herring Gas, 813 F. Supp. at 1245. The present record is insufficient for this court to rule at this juncture that the plaintiff's breach of contract claim must fail as a matter of law. Blue Ridge presented no evidence to this court demonstrating that the agreement's provisions are unreasonable as a matter of law or that this court could not restrict the agreement's application so as to make it reasonable. The defendant failed to submit evidence demonstrating how or if enforcement of the covenant would adversely affect its business or the consuming public.[5] Genuine issues of material fact exist as to whether the restrictive covenant's reach is reasonable as written or, in the alternative, to what dimensions it may be limited so as to make its application reasonable. Blue Ridge is not entitled to an award of summary judgment as to this claim and the court shall deny

[5]As noted *supra*, the major aspects upon which the Mississippi Supreme Court has focused in determining reasonableness are the rights of the employer, the rights of the employee and the rights of the public. Herring, 813 F. Supp. at 1245. As the facts of this action are outside the employer/ employee relationship, the court interpolates the first two aspects to include the rights of BSS and the rights of Blue Ridge. BSS's primary right is protection of its business from loss of customers by the activities of Blue Ridge which has peculiar knowledge of the intricacies of the bodyCushion. Id. The court's primary interest with respect to Blue Ridge is avoiding undue hardship and protecting its ability to remain competitive and in business. Id. Protection of the public's rights include avoiding the "establishment of a monopoly and [ensuring] competition and the availability of adequate services." Id. at 1246.

the motion in that regard.

IV. CLAIM FOR BREACH OF FIDUCIARY DUTY

Blue Ridge also submits that a judgment as a matter of law should be awarded it as against the plaintiff's claim of breach of fiduciary duty. The defendant contends that no fiduciary relationship existed between it and BSS and thus, no liability may attach for any alleged breach. It is well settled that a fiduciary duty must exist before a breach of that duty may arise. Merchants & Planters Bank v. Williamson, 691 So. 2d 398, 403 (Miss. 1997) (citing Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 83 (Miss. 1991)). Mississippi courts have further held that a fiduciary relationship may arise where there emerges "on the one side an overmastering influence or, in the other, weakness, dependence, or trust, justifiably reposed." Merchants & Planters Bank, 691 So. 2d at 403 (quoting Miner v. Bertasi, 530 So. 2d 168, 170 (Miss. 1988)). The existence of this relationship is a fact issue which the plaintiff must prove by clear and convincing evidence. Id.; Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1358 (Miss. 1995).

In discussing the mortgagor/mortgagee relationship, the Merchants & Planters Bank Court noted certain factual scenarios which could indicate the establishment of a fiduciary relationship. These include a history of past dealing where the plaintiff relies upon the advice or representations of the defendant or where the defendant exercises dominion or control over the plaintiff. Merchants & Planters Bank, 691 So. 2d at 404 (citing First American Nat'l Bank of Iuka v. Mitchell, 359 So. 2d 1376, 1379 (Miss. 1978); Hopewell Enterprises v. Trustmark Nat'l Bank, 680 So. 2d 812, 816-17 (Miss. 1996) (noting fiduciary relationship may arise "due to the character of the relationship over the years")).

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependence upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal, it may be moral, domestic, or personal. Nor is the law concerned with the source of such relationship. These principles are universally affirmed by courts.

Hopewell, 680 So. 2d at 816 (quoting Hendricks v. James, 421 So. 2d 1031, 1041 (Miss. 1982)).

More specifically appropriate to the situation found within the case *sub judice*, the Mississippi Supreme Court has noted that every contract does not establish a fiduciary relationship but that such may exist when the following circumstances are demonstrated:

1) the activities of the parties go beyond their operating on their own behalf, and the activities for the benefit of both;

2) where the parties have a common interest and profit from the activities of the other;

3) where the parties repose trust in one another; and

4) where one party has dominion or control over the other.

Hopewell, 680 So. 2d at 816 (citing Carter Equip. Co. v. John Deere Indus. & Equip. Co., 681 F.2d 386 (5th Cir. 1982)).[6]

As can be gleaned from the Confidentiality Agreement, BSS contracted to provide certain confidential information to Blue Ridge which Blue Ridge agreed to hold in trust and confidence while it determined whether and at what cost it could manufacture the bodyCushion. Plaintiff's Exh. 4. As such, BSS reposed a certain trust in Blue Ridge and the activities were to benefit both parties. Although it appears that the first three elements may be met, the court is of the opinion that the evidence demonstrating the existence of the fourth element appears somewhat weaker. Construing the facts in the light most favorable to the plaintiff as the court must, however, the court finds that genuine issues of material fact exist which preclude a definitive ruling as to this claim today.

In its brief, Blue Ridge contends that it was "not in a dominant position over plaintiff." Defendant's Brief at 5. However, the defendant directed this court's attention to no evidence in support of that statement. On the other hand, BSS submits that Blue Ridge was provided a preferential advantage over BSS with the transfer of confidential information. Plaintiff's Brief at 3.

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[6]The Carter Court condensed the elements into three:

1) the parties have "shared goals" in the other's commercial activity;

2) one party justifiably places trust or confidence in the integrity and fidelity of the other; and

3) the trusted party has effective control over the other party.

Cermack, 658 So. 2d at 1359 (citing Carter, 681 F.2d at 391).

The court cannot hold that Blue Ridge has met its summary judgment burden in demonstrating that no genuine issue of material fact exists as to this claim. Although the plaintiff may need to bring forth additional evidence at trial to prevail on its claim, the defendant is not entitled to a judgment as a matter of law at this juncture.

. TRADE SECRET CLAIM

As a final matter, Blue Ridge asserts that it is entitled to a judgment as a matter of law with respect to the plaintiff's claim under the Uniform Trade Secrets Act ("UTSA"). BSS alleges in its Complaint that Blue Ridge's actions relevant to this lawsuit constitute "misappropriation of trade secrets" as defined by Mississippi Code Annotated §§ 75-26-1 *et seq.* Complaint at ¶ 64. The UTSA defines a "trade secret" as

> information, including a formula, pattern, compilation, program, device, method, technique or process, that:
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by, other persons who can obtain economic value from its disclosure or views; and
> (ii) Is a subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Miss. Code Ann. § 75-26-3(d). The UTSA defines "misappropriation" as:

> (i) Acquisition of the trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (ii) Disclosure or use of a trade secret of another without express or implied consent by a person . . . ."

Miss. Code Ann. § 75-26-3(b). This statutory definition became effective July 1, 1990. Id.; ACI Chems., Inc. v. Metaplex, Inc., 615 So. 2d 1192, 1196 n.1 (Miss. 1993). Unfortunately, this court's research unearthed no Mississippi case law discussing the Mississippi Act. However, closely analogous statutes from other states have been scrutinized and the law well settled concerning their application. Generally, to establish trade secret misappropriation, the complaining party must demonstrate:

) that a trade secret existed;

) that the trade secret was acquired through a breach of a confidential relationship or

discovered by improper means; and

) that the use of the trade secret was without the plaintiff's authorization.

Phillips v. Frey, 20 F.3d 623, 627 (5th Cir. 1994) (discussing Texas trade secret statute) (citing Taco Cabana Intern'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1123 (5th Cir. 1991), *aff'd*, --- U.S. ---, 112 S. Ct. 2753, 120 L.Ed. 2d 615 (1992)).

In its brief in support of its motion for summary judgment, Blue Ridge contends that it could not have improperly acquired any trade secret because BSS voluntarily provided information about the bodyCushion to Blue Ridge.[7] Defendant's Brief at 6. The court disagrees with the defendant's limited interpretation of the UTSA. Clearly, if a party deceives another into voluntarily providing the deceiving party with a trade secret, that information has been acquired by improper means. The above described action is exactly what BSS has ascribed on behalf of Blue Ridge.

The defendant also contends that it neither disclosed nor used any trade secret as described under the Act. Id. Instead, Wingard testified at the preliminary injunction hearing before this court that he produced his company's product, the Embracer, through a process of reverse engineering of the bodyCushion.[8] Wingard Tr. at 115-17. He testified that he had previously reverse-engineered the bodyCushion prior to the time BSS provided him with its patterns and other confidential information and that Blue Ridge actually had no need of the information. Id. However, Owens testified at that same hearing that Wingard claimed BSS's patterns were necessary before Blue Ridge could tender an offer on the manufacture price of the bodyCushion. Owens Tr. at 71-72, 73. When questioned on cross examination, Owens again contradicted Wingard's testimony.

> Q: Did you know that he [Wingard] had taken a sample apart and looked at it and already figured out how to manufacture it before you sent him the patterns?

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[7]Blue Ridge does not contend in its brief that the information provided to it by BSS does not constitute a trade secret. As such, this court shall assume for the purpose of this dispositive motion that BSS has met the first factor of demonstrating the existence of a trade secret.

[8]Reverse engineering is a defense to trade secret infringement. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 160, 109 S. Ct. 971, 982, 103 L.Ed.2d 118 (1989); Phillips v. Frey, 20 F.3d 623, 629 (5th Cir. 1994).

A: If that's so, why was he persistent in requiring I send him the patterns and all the other information?

Owens Tr. at 95. Furthermore, the Embracer was not placed on the market until some time after the allegedly confidential information changed hands. Owens Tr. at 74-75 (testifying he first became aware of existence of Embracer in 1995). Viewed together, all of this evidence creates genuine issues of material fact as to whether Blue Ridge actually *used* the information provided by BSS to manufacture the Embracer. As such, Blue Ridge is not entitled to a judgment as a matter of law on the plaintiff's trade secret claim.

CONCLUSION

Having thoroughly reviewed the briefs and evidence submitted in support of and opposition to Blue Ridge's motion for partial summary judgment, the court finds that the motion is not well taken and shall deny it. Genuine issues of material fact preclude an award of a judgment as a matter of law with respect to each of the three claims targeted by the defendant. The plaintiff shall be allowed an opportunity to further flesh out the underlying facts of these claims at trial.

A separate order in accordance with this opinion shall issue this day.

THIS the ____ day of August 1997.

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United States District Judge

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VS. NO. 1:96CV161-D-A

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ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, the court, upon consideration of the motion of defendant Blue Ridge Tables, Inc. for partial summary judgment, finds the motion well taken and shall deny it.

Therefore, it is hereby ORDERED that:

) the motion of defendant Blue Ridge Tables, Inc. for partial summary judgment is hereby DENIED.

SO ORDERED this ____ day of August 1997.

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United States District Judge